

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF &
APPENDIX**

984

75-7050

DOCKET NO. 75-7050

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

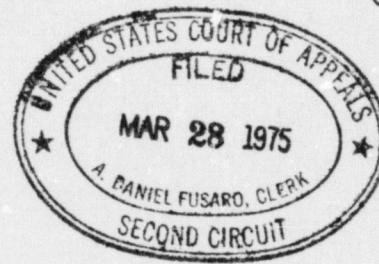
ROBERT V. Rafter

Appellant,

- against -

MANUFACTURERS TRUST COMPANY,
CARRIER CORPORATION,
GIFFORD, WOODY, CARTER & HAYS,
and DONALD HAYS,

Appellees.



ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF AND APPENDIX

ROBERT V. Rafter
Attorney for appellant
Post Office Address
120 Liberty Street
New York, New York 10006

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT V. RAFTER, :
Appellant, :
- against - : DOCKET NO. 75-7050
MANUFACTURERS TRUST COMPANY, :
CARRIER CORPORATION, :
GIFFORD, WOODY, CARTER & HAYS, :
and DONALD HAYS,
Appellees. :

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT

This is an appeal from the judgment of the U. S. District Court (SDNY)¹ entered 13 December 1974, denying plaintiff's Rule 56(f) motion for discovery, dismissing the action on the merits with respect to Carrier Corporation and granting summary judgment in favor of the remaining defendants.

1. U.S.D.C. (SDNY) 65 CIV. 1313.

OPINION BELOW

The opinion of the Honorable CHARLES BRIEANT
is not officially reported.

QUESTIONS PRESENTED

First, appellant seeks review of the order of the Honorable MURRAY I. GURFEIN entered 19 October 1973, denying inspection of the correspondence file of GIFFORD, WOODY.

Second, appellant seeks review of the judgment of 13 December 1974 in denying plaintiff's motion for a Rule 56(f) continuance to permit completion of basic discovery, as an abuse of discretion and a denial of due process.

Third, appellant questions the dismissal of the action as against CARRIER CORPORATION as an abuse of discretion and a denial of due process.

The fourth issue is whether the granting of summary judgment in favor of the remaining defendants is designed to eliminate the demand for trial by jury contrary to the fifth amendment and the seventh amendment.

Finally, there is the issue of whether the entire administration of this action, when viewed at each stage of the case and when looked at as a whole, has not been a denial of due process.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

The constitutional and statutory provisions which are relevant to decision of this case, and the pertinent text of which is appended hereto, are the fifth and seventh amendments to the Constitution of the United States, Title 42 USC, sections 1983 and 1985, and Title 15 USC, section 1, et seq.

THE FACTS

The complaint was filed against all defendants 29 April 1965 and all defendants, except CARRIER CORPORATION were served immediately with a copy of the summons and complaint. MANUFACTURERS and GIFFORD, WOODY then moved by order to show cause to stay further proceedings in the action, and this motion was granted by the order of the Honorable F. X. McGOHEY 25 June 1965 pending the posting of a bond by plaintiff.

The requisite bond was posted 19 April 1971 and notices to examine CARRIER CORPORATION officers were served by plaintiff immediately upon the filing of answers by the bank and GIFFORD, WOODY. After a separate proceeding by plaintiff before the Honorable EDMUND PORT in the U. S.

District Court for the Northern District of New York, CARRIER CORPORATION officers were examined at the Southern District in November 1971.

Depositions were held and production of documents sought by plaintiff thereafter, and the case was assigned to the Honorable MURRAY I. GURFEIN in September 1971.

Plaintiff's motion to compel production of the GIFFORD, WOODY file was denied by order of Judge GURFEIN dated 19 October 1973. In January 1974 Judge GURFEIN enjoined further discovery and called for the defendants to move for summary judgment.

In March 1974 defendants moved jointly for summary judgment, and plaintiff cross-moved for a Rule 56(f) continuance so as to permit completion of basic discovery.

In September 1974 the case was reassigned to the Honorable CHARLES BRIEANT. By order of 9 December 1974 he denied plaintiff all relief as to all defendants, and judgment to that effect was entered 13 December 1974.

From this order and judgment plaintiff appeals.

ARGUMENT

The numbered divisions below are intended to correspond with the questions presented at page two of this brief.

(1) Issue of lawyer-client privilege as to bank and defendant documents.

The quickest way to dispose of this appeal would be to order the bank and Mr. Hays to produce the W. T. Grant Co. letter to Wilson dated April 6, 1951. Production was requested before Judge BRIEANT, see last paragraph of appellant's affidavit (A 6). Each time plaintiff has made demand for this letter the case has been dismissed.²

There is such a letter, and both Mr. Hays and the bank have seen it, and it is referred to in the Hays letter to the bank (A 7).

Since the date is April 6, 1951, it predates by a few days the entrance of Mr. Hays upon the scene via the bank (A 7). Mr. Hays now (February 1975) tells us he was counsel to the OSS and wrote the European spy law.

This action names the CIA and the OSS as co-conspirators in the middle east oil monopoly (A 4).

2. Supreme Westchester, Judge Supple, 1963.
USDC Judge Cooper, 1969.
US Tax Court, Judge Hoyt, 1968.
USDC Judge Gurfein, 1973 (A 8).

Production of this letter may indicate the bank's motive, intent and interest in this matter.

Mrs. Wilson is not an attorney nor is W. T. Grant Co., and there is no lawyer-client relationship or privilege whatsoever involved.

Judge GURFEIN denied plaintiff the Hays file 19 October 1973 (A 8), and then the case was reassigned to Judge BRIEANT who refused to review the order of Judge GURFEIN or permit a renewed application by plaintiff (A 24).

As to the remainder of the Hays file, Judge GURFEIN denied plaintiff's request on the ground that it was privileged within the lawyer-client relationship (A 8). This denial of plaintiff's motion is a denial of due process. Plaintiff had made out a prima facie case of fraud against Gifford, Woody and Hays, see exhibits to motion papers³ and see exhibits in Record No. 35, Exhibits III to VII.

The attorney-client privilege cannot be used as a cloak for illegality or fraud.

Clark v. U.S., 289 U.S. 1, 15,
53 S.Ct. 465;
Clark v. State, 261 S.W. 2d, 339, cert.
den. 346 U.S. 855, 74 S.Ct. 69.

3. Record No. 25.

In Supreme Westchester Hays offered to let plaintiff have the file provided he stipulate not to proceed against any addressee or correspondent, see Westchester record page 38:

"or with any addressees or correspondents of letters or memoranda appearing in said file."

This despite the fact that the Appellate Division for the Second Judicial Department had granted plaintiff a trial of the action, 18 App. Div. 2d 683, and Judge Supple refused to let plaintiff have the file unless he so stipulate, Westchester record page 40:

"THE COURT: That will be my ruling. If you want to look at it you have to stipulate that you won't use it for any lawsuit."

Plaintiff did not so stipulate, and the Westchester case was dismissed for lack of evidence and the two day jury was wasted.

This holding occurred 6 November 1963.

Production of the W. T. Grant letter and the Hays file is requested just as a matter of fair trial and due process.⁴

4. Murphy v. Waterfront Commission, 378 U.S. 52, 55.

The monopoly, the restraint of foreign commerce and the obstruction of justice⁵ would then become self-evident by means so inimical as to constitute an intrinsic wrong in violation of the antitrust laws.

Atlantic Co. v. Allied Co., 284 Fed. 2d 879, at 883-884.

(2) Dismissal of the action against Carrier Corporation is a denial of due process and an abuse of discretion.

The judgment states that the action is dismissed as against Carrier Corporation (A 24)

"upon motion of the defendants ..."

No one moved for dismissal against Carrier Corporation; the dismissal was on the court's own motion.

Carrier Corporation testified at length in November 1971. Carrier testified at length 6 January 1954. Production of the W. T. Grant Co. letter and Hays' file would test the truth of that testimony.

Carrier has not been prejudiced by lack of service of the complaint since its chairman and executive officer saw the complaint and became fully conversant with the case

5. (A 3) complaint, two causes of action, 15 USC sec. 1 et seq. and 42 USC sec. 1985.

when ordered to testify by the Honorable EDMUND PORT of the Northern District Court in November of 1971 (A 9), bearing in mind that the order⁶ of Judge McGOHEY of 25 June 1965 prohibited service upon Carrier Corporation and the stay lasted six years until plaintiff filed a bond 26 April 1971 (A 1).

Produce the letter and the file, and we shall see the concealment alleged in the complaint.⁷

(3) Denial of plaintiff's Rule 56(f) motion is a denial of due process.

All witnesses called for deposition were recalcitrant as recited at length in the motion papers⁸. The bank has not testified or produced any documents, and Gifford, Woody and Hays have refused production of documents. Plaintiff's basic discovery was cut off by Judge GURFEIN in February 1974⁹.

The rule appears to be that where basic discovery is outstanding, a Rule 56(f) continuance with respect to summary judgment will be granted.

Broadcast Music Inc. v. Columbia Broadcasting System Inc., 55 FRD 292 (SDNY);
Harris v. Pate, 440 F. 2d 315;
Yale Law Journal, Vol. 83: 745, 1974 at 767.

6. (A 17).

7. (A 3), paragraphs 14 to 18 and 26 to 28.

8. Record No. 35.

9. Record No. 42, transcript.

Accordingly, under our system of fair trial, appellant respectfully requests a Rule 56(f) continuance to complete discovery and production as stated above and as stated in plaintiff's motion papers

(4) The issue of res judicata
and collateral estoppel.

Both Judge McGOHEY and Judge BRIEANT have relied upon the bank's defense of the Westchester judgment as res judicata in this action.¹⁰

For res judicata to be a valid defense the judgment must be one on the merits. But the Westchester judgment was not on the merits (A 20) and the bank admits this (A 21, 22).

So also when Mr. Hagen¹¹ states to Judge McGOHEY:

"In an obvious attempt to avoid the defenses of res judicata and collateral estoppel ..."

the bank again deliberately misleads this court.

Again, Mr. Landau tells Judge GURFEIN and Judge BRIEANT that the facts decided by Judge SUPPLE in the Westchester action provide a defense of collateral estoppel in the present action (A 5):

10. (A 17).

Record Nos. 7 and 40.

11. Lawyer for Simpson, Thacher representing the bank.
Record No. 3, page 9 at paragraph 19 of Hagen affidavit.

"Under the doctrine of Collateral Estoppel this court is bound to accept as true the findings of fact of the state court ..."

This is more misrepresentation by the bank. The Westchester action was tried by a jury, and Judge SUPPLE decided no facts, and any legal conclusion of his was merged in the judgment, a judgment not on the merits, CPLR 5013 (New York statute law) (A 5).

Rule 5013. Effect of judgment dismissing claim.

A judgment dismissing a cause of action before the close of proponent's evidence is not a dismissal on the merits unless it specifies otherwise, but a judgment dismissing a cause of action after the close of the proponent's evidence is a dismissal on the merits unless it specifies otherwise.

So, it would seem that, for Judge McGOHEY to stay the action for six years and for Judge BRIEANT to rely on these defenses in his dismissals is error and a denial of due process, and this stems from Chief Justice WARREN in Lawlor v. National Screen Service Corporation, 75 S.Ct. 865, 867, 868, 349 US 322.

(5) Question of whether issues of fact of monopoly, restraint of foreign commerce, obstruction of justice and conspiracy should be decided by the jury rather than the court.

Plaintiff demanded trial be jury by demand dated and served 17 May 1971. And plaintiff's responding affidavits to motion for summary judgment¹² (A 13) controvert and place in issue each averment of the defendants, and issues of fact are present, genuine issues of material fact. The court in its order and judgment (A 24) has decided those issues contrary to the Fifth Amendment and the Seventh Amendment. Again, citing Chief Justice Warren, supra at page 867:

"As to the producers, however, the District Court held that conflicting evidence on the issue of conspiracy made a trial necessary."

Further, Rule 56 requires an affidavit of the moving party on personal knowledge. We are met with Mr. Landau's¹³ affidavit only, and no affidavit from the bank.

(6) The statute of limitations.

Paragraph 19 of the complaint (A 3) alleges that the antitrust suit is based in whole or in part upon matters complained of in the United States antitrust suit

- 12. Record No. 35, 21 page affidavit with exhibits I to XIX and memorandum of law.
Record No. 37, affidavit with exhibits I to VII.
Record No. 35A, plaintiff's Rule 9g statement.
- 13. Mr. Landau is the bank's lawyer.

against the oil trust pending. It would seem that section 16(b) and Zenith Radio Corp. v. Hazeltine Research, Inc., 401 US 321, 28 L.Ed. 2d 77, 91 S.Ct. 795, support the timeliness of the commencement of suit against all of the defendants.

CONCLUSION

For the reasons stated above, plaintiff respectfully requests that the order of the district court entered 19 October 1973 (Honorable MURRAY I. GURFEIN) be reversed and that the judgment and order of the Honorable CHARLES BRIEANT be reversed and the matter remanded for production of documents for inspection and for further discovery and trial by jury.

Respectfully submitted,

ROBERT V. RAFTER
Attorney for appellant
Post Office Address
120 Liberty Street
New York, New York 10006

APPENDIX

| DATE | PROCEEDINGS | Date Order Judgment |
|-------------|---|------------------------|
| Apr. 29-65 | Filed complaint and issued summons. | |
| May 13-65 | Filed summons & ret. Served Manufacturers Trust & Gifford, Woody, Carter & Hays-5-5-65. | |
| May 20-65 | Filed deft's affdvt. & show cause order to file security, etc.-ret. 5-25-65 | |
| May 20-65 | Filed deft's memorandum in support of its motion | |
| May 25-65 | Filed defts' (Gifford, Woody, et al) affdvt. & notice of motion for security for costs-etc.-ret. 6-1-65 | |
| June 11-65 | Filed defts' notice re: bond for security for costs | |
| June 11-65 | Filed affdvt. of Robert V. Rafter | |
| June 11-65 | Filed Memorandum Opinion #31,335--The pltff. will be required to file security in the sum of \$1500 to cover all costs in the action. Settle one order for both motions-McGohey, J. | |
| June 25-65 | Filed order that motions for security for costs is granted and pltff. furnish said security in the amount of \$1500 by depositing cash in said amount with the Clerk or by a bond when security is posted the pltff. give written notice to that effect to the defts. until the filing of said security all proceedings on the part of the pltff be stayed--McGohey, J. mailed notice | |
| July 2-65 | Filed notice of entry & copy of order dated 6-25-65 | |
| Apr. 26 71 | Filed Bond in the sum of \$1,500. by General Insurance Co. of America in accordance with terms of the order of McGohey, J. entered 6-25-65. | |
| May 10 71 | Filed ANSWER to complaint by Deft Mfg. Hanover Trust Co. | STB |
| May 17 71 | Filed ANSWER by Defts Gifford, Woody, Carter & Hays and Donald Hays to the complaint. | GWCH |
| May 25-71 | Filed pltff's notice to take deposition Joseph Elleo. | |
| JULY 2 71 | Filed Deft Manuf. Hanover Trust Co. Interrogs to the pltff. | |
| Oct 19-71 | Filed defts' Mfg. Trust Co. affdvt & notice of motion to dismiss complaint ret. 10-28-71 | |
| OCT 20 71 | Filed MEMO ENDORSED on motion papers filed Oct. 19, 71. "Motion consented to - FIFTH SUBMIT ORDER. Gurfein J." | |
| Jun 12 72 | Filed Deft Manuf. Hanover Trust Co. Notice to take deposition of the pltff on Jun. 22 1972. | |
| Oct. 17-72 | Filed Pltffs Notice to take deposition, of Joseph Elleo. | |
| Oct. 17-72 | Filed Pltffs Notice to take deposition, of Bertran Toppino. | |
| Apr. 2, 73 | Filed Pltff's Notice to Take Deposition, of NY City Dept of Health & Hospitals returnable 4/12/73, Room 601, 2:30 P.M. | |
| Apr. 2, 73 | Filed Pltff's Notice to Take Deposition of E.R. Higgins returnable 4/16/73, 10:00 A.M. | |
| Apr. 2, 73 | Filed Pltff's Notice to Take Deposition of Donald Hays returnable 4/23/73, 10:30 A.M. | |
| Apr. 2, 73 | Filed Pltff's Notice to Take Deposition of C.B. Hilton returnable 4/12/73, 2030 P.M. | |
| Apr. 25, 73 | Filed Pltff's Motion before Judge Gurfein on 4/27/73, 10:00 A.M. re Order pursuant to Rule 45 FRCP. & Affdvt of Robert V. Rafter. | |
| Apr. 25, 73 | Filed Affdvt of George B. Fargis for Pltff. | |
| Jul 8-73 | Filed memo endorsed on motion filed 4-25-73-Appearance of witness arranged for at pre-trial conference. Motion to punish for contempt denied.--Gurfein, J. | |
| 8-8-73 | Filed pltff.notice to take deposition of Frederick Leary on Aug. 17, 1973. | |
| 8-8-73 | Filed notice to take deposition(pltff.) of Gov. Employees Ins. Co. on Aug. 16, 1973. | |
| Sep. 6, 73 | Filed Pltff. Motion for Rule 37 Order Compelling Production of Documents Filed memo end. on pltfs. motion dated Sept. 6, 1973 compelling defts. | |
| Oct. 19-73 | Gifford, Woody, Carter and Hays and Donald Hays to produce documents for discovery--Upon inspecting the correspondence file of Clifford, Woody, Carter and Hays in the case of Rafter vs Wilson, the court finds that the documents contained therein fall within the scope of the attorney-client privilege. | |
| | Accordingly, the motion to compel production of documents is denied in said file. So ordered, Gurfein, J. m/n | |
| | RE-TRIAL CONFERENCE SET FOR BY Gurfein J. | |

Crt. V. Maister vs. Manufacturers Trust Co.

CIV 1313

page 3

Judge Gurfein

| DATE | PROCEEDINGS |
|---------|---|
| b-13-74 | Filed pltf's notice to take depositions of J. John Potser on 2-27-74 |
| b-13-74 | Filed pltf's notice to take depositions of Vincent Tirola on 2-27-74 |
| b-13-74 | Filed pltf's notice to take depositions of Sidney Spector on 2-26-74 |
| b-13-74 | Filed pltf's notice to take depositions of The Insurance Co. of North America on 2-25-74. |
| b-13-74 | Filed pltf's notice to take depositions of George B. Farris on 2-26-74. |
| b-13-74 | Filed pltf's notice to take depositions of Lee Spiegelman on 2-28-74. |
| b-13-74 | Filed pltf's notice to take depositions of John Garrity on 2-25-74. |
| r-11-74 | Filed affdvt. and notice of motion by defendants Manufacturers Hanover Trust Co., Gifford, Woody, Carter & Hays and Donald C. Hays for summary judgment. - ret. 3-25-74 |
| r-11-74 | Filed memorandum of law by deft. Manufacturers Hanover Trust Co., et al. in support of motion for summary judgment. |
| r-15-74 | Filed plaintiffs statement under Rule 9(g) a stay or continuance |
| r-15-74 | Filed plaintiffs affdvt. and notice of motion for/summary judgment motion presently pending before the Court (deft's motion) to permit depositions to be taken and discovery to be held in accordance with the terms of Rule 56(f) - ret. 4-24-74 (oral argument requested for both summary judgment motions and for Rule 56(f) cross-motion. |
| r-17-74 | Filed memo endorsed on deft. "Manufacturers", Gifford Wood, et. al. Mot. for summary judgment is pending. A cross-motion by the pltf. to stay deft's motion to permit depositions to be taken and for further relief is also pending. Before deciding either motion the Court will afford the pltf. an opportunity to present by affdvts on personal knowledge facts in support of § 7,8 and 11a of his complaint, etc. The pltf is required to supply such affidavits by May 2, 1974 at 4 P.M. The Court will then take further action. It is so ordered. -- Gurfein, J. m/n |
| r-23-74 | Filed affdvt. of Henry Landau (on behalf of deft. Manufacturers) in opposition to pltf's motion for a stay. |

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT V. RAFTER,

Plaintiff

- against -

MANUFACTURERS TRUST COMPANY,
CARRIER CORPORATION,
GIFFORD, WOODY, CARTER & HAYS,
and DONALD HAYS,

Defendants



ROBERT V. RAFTER, for his complaint, alleges
as follows:

FIRST CAUSE OF ACTION

1. That the subject matter of this action arises under the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U.S.C., Section 1 et seq., entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies", commonly known as the Sherman Act, and the Act of Congress of October 15, 1914, c. 323, Section 4, 38 Stat. 731, as amended, 15 U.S.C., Section 15, commonly known as the Clayton Act.
2. That at all times hereinafter mentioned the defendant Manufacturers Trust Company was a banking corporation, incorporated under the laws of the State of New York, having offices at 44 Wall Street in the City and State of New York.
3. That at all times hereinafter mentioned Carrier Corporation was a domestic corporation, organized under the laws of the State of Delaware, having offices at 385 Madison Avenue in the City and State of New York.

4. That at all times hereinafter mentioned Donald Hays was a member of the law firm of Gifford, Woody, Carter & Hays, having offices at No. 1 Wall Street in the City and State of New York.

5. That at all times hereinafter mentioned plaintiff was a citizen of the United States, residing in the City and State of New York and employed as General Attorney for Carrier Corporation.

6. That during the month of March, 1951, the oil of Iran was nationalized and placed under the control of the National Iranian Oil Company of Iran. The dispute with respect to the oil was limited to the interests of Iran and those of the Anglo-Iranian Oil Co., Ltd. The dispute in no way involved the United States Government, nor United States oil companies, nor their financial affiliates, banking, insurance or otherwise.

7. That during the period commencing on or about April 10, 1951 to and including October 26, 1951, plaintiff was engaged in negotiations with the National Iranian Oil Company of Iran for the purchase, sale and lease of oil tankers to the National Iranian Oil Company.

8. That on or about the first day of September, 1951, plaintiff obtained an offer of oil from the National Iranian Oil Company of Iran in payment for a proposed sale or lease of tankers at a sales price of Eleven Million and 00/100 (\$11,000,000) Dollars.

9. That beginning about January of 1946, the exact date being unknown, and continuing thereafter up to and including the date of filing of this complaint, the defendants and the Central Intelligence Agency and its predecessor, the Office of Strategic Services, and others, including the financial community in New York City, banking and insurance, have been, and are now, monopolizing and have been, and are now, engaged in an unlawful combination and conspiracy to restrain and monopolize the hereinbefore described foreign trade and commerce.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ROBERT V. Rafter,

Plaintiff

CLB

- against -

65 CIV. 1313

MANUFACTURERS TRUST COMPANY,
CARRIER CORPORATION,
GIFFORD, WOODY, CARTER & HAYS,
and DONALD HAYS,SUPPLEMENTARY AFFIDAVIT
IN OPPOSITION TO DEFENDANTS'
MOTIONS FOR SUMMARY JUDG-
MENT.

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT V. Rafter, being duly sworn, deposes and says:

He is the plaintiff in the above entitled action, and plaintiff respectfully asks permission to file this affidavit in supplement of his response to defendants' motions for summary judgment for the purpose of setting right the record of the purported defense of collateral estoppel.

The bank states that:¹

Under the doctrine of Collateral Estoppel this Court is bound to accept as true the findings of fact of the state Court . . .

In truth the Westchester action was tried by a jury, and no issues of fact were decided by the court. The court did decide an issue of law that the evidence was insufficient to submit to the jury. This conclusion of law was merged in the judgment, a judgment not on the merits.²

It is respectfully submitted that the doctrine of collateral estoppel does not apply to questions of law.

1. Mr. LANDAU's brief, page 5, last paragraph.
2. CPLR 4401 and 5013.

The defense of collateral estoppel is untenable, and the bank's argument is false. The bank has again misrepresented the facts.

Perhaps the following should be added in furtherance of plaintiff's opposition:

Collateral estoppel applies to questions of fact and does not apply to questions of law. For collateral estoppel to apply, the factual issues must be identical. The Westchester action did not involve a plan to restrain or monopolize foreign commerce, nor a plan to impede plaintiff's rights under color of state law. Nor was oil or the CIA a part of the Westchester issues.

A further prerequisite to collateral estoppel as a defense is that there must have been a full and fair opportunity to contest the decision now said to be controlling. Plaintiff was denied the letters of Erskine to the bank, Wilson to the bank and W. T. Grant to Wilson:

Erskine to the bank, April 6, 1951;
Wilson to the bank, March 29, 1951;
W. T. Grant to Wilson, April 6, 1951.

These letters are in the physical possession, custody or control of the bank within the meaning of Federal Rule 34, and, if a Rule 56(f) continuance is granted, plaintiff will seek their production by the bank. They predate by a few days the appearance of DONALD HAYS and his firm upon the scene, and may very well be evidence of the inception of a plan to do the plaintiff in, as alleged in the complaint, showing bank involvement, intent and interest.

s/ Robert V. Coffey

Q.X 1

A7

Hays

April 17, 1951

Mr. Thomas E. Speer
Manufacturers Trust Company
149 Broadway
New York 6, N.Y.

Re: Estate of Frank P. Wilson, deceased

Dear Mr. Speer:

We are returning to you your correspondence and the Waifant of Attachment which you lent us, and are enclosing a copy of our letter to Mr. Erskine which is self-explanatory.

If you don't mind we will keep Mr. Erskine's letter to you dated April 6th, Mrs. Wilson's letter to you dated March 29th, and a copy of the letter from W. T. Grant Company to Mrs. Wilson dated April 6th. If at any time you want this correspondence, let us know.

We appreciate your having referred this matter to us and will do our best to please Mrs. Wilson.

Very truly yours,

GLIFFORD, WOODY, CARTER & HAYS

DCH ab
Enclosures

Donald C. Hays

PLTFC-EX. B-1d
DEFTS EX.
HARVEY KEITEL
REPORTER 1/1/2

A 22
ENDORSED ORDER OF JUDGE GURFEIN 19 OCTOBER 1973

Filed memo endorsement on plaintiff's motion dated September 6, 1973, compelling defendants Gifford, Woody, Carter and Hays and Donald Hays to produce documents for discovery ---- Upon inspecting the correspondence file of Gifford, Woody, Carter and Hays in the case of Rafter v. Wilson, the court finds that the documents contained there in fall within the scope of the attorney-client privilege. Accordingly, xxxx the motion to compel production of documents is denied in said file.

So ordered, GURFEIN, J.

19 October 1973.

U. S. DISTRICT COURT
N. D. OF N.Y.
FILED
NOV 11 1971
AT 10 O'CLOCK A.M.
J. R. SCULLY, Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ROBERT V. RAFTER, :

Plaintiff, : ORDER

-against- : Misc. No.

MANUFACTURERS TRUST COMPANY, CARRIER
CORPORATION, GIFFORD, WOOD, CARTER &
HAYS, and DONALD HAYS, :

Defendants. :

Upon reading and filing the order to show cause
of plaintiff, dated August 11, 1971, moving for an order
pursuant to Rule 45(f) of the Federal Rules of Civil Pro-
cedure adjudging William Bynum and Melvin Holm in contempt
of court, and the affidavit of Robert V. Rafter, sworn to
August 5, 1971 and the exhibits annexed thereto, submitted
in support of the motion; and

Upon reading and filing of the affidavit of E.
Michael Bradley, sworn to October 21, 1971, the affidavit
of Herman Seid, sworn to October 21, 1971, the affidavit
of Melvin Holm, sworn to October 20, 1971, and the exhibits
thereto, submitted in opposition of the motion; and

The motion having duly come before this Court on
October 26, 1971, and the plaintiff and the attorneys for
William Bynum and Melvin Holm having agreed that the
depositions of William Bynum and Melvin Holm be taken at
a mutually convenient date between November 10 and November
30, 1971 in the Courthouse of the United States District
Court for the Southern District of New York and that an

order be entered setting the precise time and place for said depositions;

NOW THEREFORE, on consent of the plaintiff and the attorneys for William Bynum and Melvin Holm, it is

ORDERED that William Bynum appear at Room 601 of the United States District Court for the Southern District of New York, at the United States Courthouse, Foley Square, New York, New York, on November 12, 1971, at 10:30 A.M. for the taking of his testimony by oral examination in the above entitled action pursuant to the Federal Rules of Civil Procedure, and

IT IS FURTHER ORDERED that Melvin Holm appear at Room 601 of the United States District Court for the Southern District of New York, at the United States Courthouse, Foley Square, New York, New York, on November 12, 1971, at 2:00 P.M. for the taking of his testimony by oral examination in the above entitled action pursuant to the Federal Rules of Civil Procedure, and

IT IS FURTHER ORDERED that William Bynum and Melvin Holm are directed to bring with them the documents in writing set forth in the subpoenas duces tecum served upon them July 26, 1971, and

IT IS FURTHER ORDERED that the motion of plaintiff to adjudge William Bynum and Melvin Holm in contempt of court is withdrawn.

Dated: November 9, 1971

Auburn, NY

Edmund Poole
United States District Judge

Oral argument requested for both
summary judgment motions and for
Rule 56(f) cross motion.
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
X - - - - - R.V.R.

ROBERT V. Rafter,

Plaintiff, MIG
- against - 65 CIV. 1313

MANUFACTURERES TRUST COMPANY,
CARRIER CORPORATION,
GIFFORD, WOODY, CARTER & HAYS,
and DONALD HAYS,

Defendants.

X - - - - -

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of ROBERT V. Rafter sworn to the 15th day of April, 1974, the undersigned will move this Court at a motion term thereof to be held at Room 2904 of the United States District Court, United States Courthouse, Foley Square, New York, New York, on the 24th day of April, 1974, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel may be heard, for an order pursuant to Rule 56(f) of the Federal Rules of Civil Procedure granting plaintiff a stay or continuance with respect to the summary judgment motions of the defendants, presently pending before the Court in this action, to permit depositions to be taken and discovery to be had in accordance with the terms of Rule 56(f), and for such other and further relief as to the Court shall seem just and equitable.

PLEASE TAKE FUTHER NOTICE that plaintiff respectfully requests oral argument of the motion for a Rule 56(f) continuance and of the summary judgment motions of the defendants MANUFACTURERS TRUST COMPANY, GIFFORD, WOODY, CARTER & HAYS and DONALD HAYS.

Dated: April 15, 1974.

Yours, etc.

ROBERT V. Rafter
Attorney for plaintiff
120 Liberty Street
New York, New York

10006

Tel. 962-0248

TO:

SIMPSON, THACHER & BARTLETT
Attorneys for MANUFACTURERS TRUST COMPANY
1 Battery Park Plaza
New York, New York

10004

GIFFORD, WOODY, CARTER & HAYS
Attorneys for DONALD HAYS and pro se
1 Wall Street
New York, New York

10005

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
X - - - - - X

ROBERT V. Rafter,

Plaintiff,

MIG

- against -

65 CIV. 1313

MANUFACTURERS TRUST COMPANY,
CARRIER CORPORATION,
GIFFORD, WOODY, CARTER & HAYS,
and DONALD HAYS,

Defendants.

X - - - - - X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT V. Rafter, being duly sworn, deposes and says:

He is an attorney at law duly admitted to practice before the Supreme Court of the State of New York and before the United States District Court for the Southern District of New York.

He is the plaintiff above named and makes this affidavit on personal knowledge in compliance with Rule 56(e) of the Federal Rules of Civil Procedure (1) in opposition to the motions for summary judgment of the defendants MANUFACTURERS TRUST COMPANY, GIFFORD, WOODY, CARTER & HAYS and DONALD HAYS, and (2) in support of plaintiff's cross-motion for Rule 56(f) relief for a continuance or stay of the summary judgment motions so as to permit depositions to be taken and discovery to be had.

By way of guidance, part (1) of this affidavit sets forth specific facts showing that there are genuine issues for trial within the meaning of Rule 56(e). Part (2) of this affi-

davit supports plaintiff's cross motion for Rule 56(f) relief in the form of a continuance. And part (3) of this affidavit is a paragraph by paragraph reply to the affidavits of Mr. Landau and Mr. Hays. It should also be stated that plaintiff's memorandum of law in support of his Rule 56(f) motion and in opposition to the summary judgment motions is appended at the end of this affidavit in advance of the exhibits attached.

(1)

At the outset it should be noted that the moving papers of the bank fail to include an affidavit made on personal knowledge of the bank as required by Rule 56(e). For this reason the bank's motion should be denied peremptorily. In other words, we are met with an affidavit from SIMPSON, THACHER & BARTLETT only, rather than an affidavit of MANUFACTURERS TRUST COMPANY, the party defendant. It appears that the defendants would have disputed questions of fact turn exclusively on the credibility of movants' witnesses, Landau, Hays and Doering. It would also seem just that the issue of credibility be decided by the jury, see jury demand served May 17, 1971, Exhibit I.

Thus in Cross v. United States, 336 F2d 431 at 433 the court, in reversing and remanding for trial, stated:

this principle does not justify summary relief where, as here, the disputed questions of fact turn exclusively on the credibility of movant's witnesses.

So, also, in Dressler v. MV Sandpiper, 331 F 2d 130 at 134 the court states:

Nor are we saying that an issue which turns on credibility of witnesses should be decided by summary judgment rather than on a trial.

So in this antitrust suit there is an issue of fact to be decided, and that issue is whether there was a plan afoot to injure the plaintiff -- whether there was a conspiracy. The plaintiff says there was, and the defendants say there was none. Deponent respectfully asks that this issue of fact be decided by the jury.

To put it more clearly¹:

The Court: No, I am ruling now, I am not arguing with you. I am telling you.

Mr. Robert Wright: Your Honor, you know when --

The Court: You have charged here Counsel, if I may call your attention to it once more, you have charged here that there is a conspiracy to do this. He says he didn't have any agreement with anybody else. And they are going to put them all on. Then you are going to talk to the jury and try to convince them there was a conspiracy. You have a right to do that.

The plaintiff respectfully seeks his right to put them all on.

As to the complaint, section 15 of Title 15 U.S.C. permits any person injured in his business or property by reason of anything forbidden in the antitrust laws to sue therefore in any district court of the United States.

Plaintiff alleges jurisdiction at paragraph 1, and at paragraph 9 a continuing conspiracy or unlawful combination to restrain and monopolize foreign trade upon the part of the defendants and others.

Paragraph 10 sets forth the nature of the plan, and 11 sets forth the acts of the defendants and others.

Paragraph 12 sets forth specific damage to plaintiff's business, and 13 describes in detail damage to plaintiff's property.

¹ Tivoli Realty v. Paramount Pictures, Inc. 209 F.2d 41,43

The wherefore clause seeks appropriate accountings and threefold damages in accordance with 15 U.S.C., Section 15.

It would seem therefore that plaintiff has stated a claim upon which relief can be granted.

Defendants also plead the statute of limitations affirmatively. Paragraphs 14 through 18 allege concealment continuing to the date of the complaint. And concealment, it is said, tolls the statute of limitations. It is also said that concealment is fraud, and it is read into every federal statute.

Paragraph 19 states that the antitrust suit is based in whole or in part upon the United States antitrust suit against the oil trust, Civ Action 86-27, 1953. This suit was terminated in May of 1968. This antitrust suit was commenced April 29, 1965, well within Section 16(b) limitations.

So, it would seem that the present action meets with statute of limitation requirements.

Now as to Rule 56(e) requiring that specific facts be set forth, the rule contains the proviso "When a motion for summary judgment is made and supported as provided in this rule". It appears that the motion of the bank has not been made and supported as provided in Rule 56(e) because the moving papers do not include an affidavit made upon personal knowledge of the bank.

In any event, there are issues of fact giving rise to genuine issues for trial. The first issue of course is one of credibility of Mr. Hays, Mr. Seid, Mr. Landau, Mr. Doering, the defendants' witnesses.

A second issue is whether there was a plan to injure plaintiff and so restrain and monopolize foreign commerce as alleged in the present complaint and also in the 1953 complaint.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT V. RAFTER, :
Plaintiff, :
-against- :
MANUFACTURERS TRUST COMPANY,
CARRIER CORPORATION,
GIFFORD, WOODY, CARTER & HAYS,
and DONALD HAYS,
Defendants.

ORDER



Defendant Manufacturers Hanover Trust Company, sued herein as Manufacturers Trust Company, having moved this Court by Order to Show Cause dated May 19, 1965 for an order, inter alia, requiring plaintiff to file security, pursuant to Rule 2 of the Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York, for such costs as may be allowed to said defendant herein, for a stay of all proceedings on the part of plaintiff pending the giving or posting of said security, and for other specified relief, and defendants Gifford, Woody, Carter & Hays and Donald Hays having also moved this Court by notice of motion for similar relief,

Now, upon reading and filing said Order to Show Cause dated May 19, 1965, the affidavit of James J. Hagan, sworn to May 19, 1965, and the exhibits attached thereto, all in support of the aforesaid motion of defendant Manufacturers Hanover Trust Company, and the affidavit of Robert V. Rafter, sworn to May 28, 1965, in opposition to said motion, and having also read and filed the supporting

and opposing papers submitted in connection with the companion motion of defendants Gifford, Woody, Carter & Hays and Donald Hays, and both of said motions having been duly called for hearing by this Court on June 1, 1965, and Simpson Thacher & Bartlett, by James J. Hagan, Esq., having argued orally in support of the aforesaid motion of defendant Manufacturers Hanover Trust Company, and Gifford, Woody, Carter & Hays, by Edward Purvis, Esq., having argued orally in support of the motion on behalf of defendants Gifford, Woody, Carter & Hays and Donald Hays, and Robert V. Rafter, appearing pro se, having argued in opposition to both of said motions, and due deliberation having been had by this Court and a decision having been duly filed by the Court on June 11, 1965;

NOW, on motions of Messrs. Simpson Thacher & Bartlett and Messrs. Gifford, Woody, Carter & Hays, it is

ORDERED that the motions for security for costs, pursuant to Rule 2 of the Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York, be and the same are hereby granted and said security is fixed in the sum of Fifteen Hundred (\$1500) Dollars; and it is further

ORDERED that plaintiff furnish said security in the amount of Fifteen Hundred (\$1500) Dollars by depositing cash in said amount with the Clerk of this Court or by filing a bond in said amount which shall comply with the provisions of Rule 31 of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York with the Clerk of this Court; and it is further

*Ordered that when the security is posted the plaintiff
give written notice to the Clerk to the effect that
it is so done.*

*S.M.M.
6/25/65*

ORDERED that until the filing of the aforesaid security, all proceedings on the part of the plaintiff be and they hereby are stayed; and it is further

ORDERED that the time of all defendants to answer or make any motion with respect to the complaint herein be and it hereby is extended until ten (10) days after the attorneys for said defendants receive written notice from plaintiff herein that the security required pursuant to the provisions of this Order has been duly posted; and it is further

16/25/66
~~ORDERED that if said security in the sum of Fifteen Hundred (\$1500) Dollars is not filed pursuant to the provisions of this Order within twenty (20) days after the service of a copy of this Order with Notice of Entry upon the plaintiff, the Clerk of this Court is directed to enter an order dismissing this action with prejudice upon submission of an order based upon an affidavit of non-compliance with the terms of this Order upon five (5) days' notice to the plaintiff.~~

Dated: New York, N. Y.

June 25th 1965.

John F. X. McGonney
John F. X. McGonney
United States District Judge

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-----x
ROBERT V. RAFTER,

| | |
|---|-------------|
| Plaintiff, | : JUDGMENT |
| -against- | : Index No. |
| MANUFACTURERS TRUST CO., D. HAYS and A. KELLEGREW, | : 3221/1961 |
| Defendants. | : 246/430 |

-----x

The above entitled action having been brought on for trial at a Trial Term, Part II, of the New York Supreme Court held in and for the County, of Westchester at the County Courthouse therein on the 4th and 6th days of November, 1963 before Mr. Justice Leonard J. Supple and a jury, and the defendant having moved at the close of the plaintiff's case to dismiss the complaint on the ground that plaintiff had failed to prove facts sufficient to constitute a cause of action, and the said motion having duly been granted

NOW on motion of Messrs. Simpson Thacher & Bartlett, attorneys for the defendant, it is

ADJUDGED that the complaint in the above entitled action be, and the same hereby is, dismissed without costs.

JUDGMENT signed this 17 day of December, 1963.

Edward L. Warren
Clerk

A 21

SIMPSON THACHER & BARTLETT
120 BROADWAY
NEW YORK 5, N.Y.

MIDTOWN OFFICE:
350 PARK AVENUE
NEW YORK 22, N.Y.

WORTH 4-1900

TAX COURT OF THE U.S.
MARKED FOR IDENTIFICATION
ADMITTED IN EVIDENCE

DEC 4 - 1968

49

PETITIONER'S EXHIBIT
RESPONDENT'S EXHIBIT
DOCKET NO. 2644-71

WASHINGTON OFFICE:
1700 K STREET, N.W.
WASHINGTON 6, D.C.

April 2, 1964

Robert V. Rafter, Esq.
150 Broadway
New York, New York 10038

Dear Mr. Rafter:

I went up to the Courthouse in White Plains yesterday and looked at the minutes and judgment which you desire to amend. I am willing to agree to the entry of an order along the lines of the enclosed which I trust will meet with your approval.

Miss Robie has requested that if an order is entered along these lines she be furnished with a copy which may be entered in her minutes so that there will never be any question as to what actually happened. I suggest that if the enclosed meets with your approval, you sign it and present it to the Court. I would appreciate a copy if and when the Court gives its approval.

Sincerely yours,

(Encs.)

CC: Miss Florence Robie, Clerk
Trial Term Part II
Supreme Court, County of Westchester
County Courthouse
White Plains, New York

At a Term, Part of
the Supreme Court, Held in and
for the County of Westchester, at
The County Court House, in the
City of White Plains, New York,
on the day of , 1964.

P R E S E N T:

HONORABLE

Justice.

-----x
ROBERT V. Rafter, : ORDER
Plaintiff, : Index No.
-against- : 3221/1961
MANUFACTURERS TRUST CO., D. HAYS
and A. KELLEGREW, :
Defendants. :
-----x

On the annexed consents of the parties hereto, it
is hereby

ORDERED that the Clerk's minutes made and entered
herein November 6, 1963 by the Clerk of the Trial Term,
Part II of this Court be, and they hereby are amended to
delete so much thereof as states that plaintiff rested, and
to add in place of said statement a statement to the effect
that plaintiff stated that he had no further evidence to
offer on the issue of liability, and that all of his further
evidence related to the issue of damages, and it is further

ORDERED that the recitals of the judgment
entered herein on the 17th day of December, 1963 be amended

so as to reflect that the complaint herein was ordered dismissed, pursuant to Rule 4401 of the Civil Practice Law and Rules, upon motion made by defendant on the basis of the proceedings theretofore had and of an admission made by the plaintiff prior to the close of his case that he had no further evidence to offer on the issue of liability, and that all his further evidence related solely to the issue of damages.

E N T E R

— J.S.C. —

We hereby consent to the entry of the foregoing order without further notice.

— Plaintiff, Pro se —

George H. L. Miller
Attorneys for Manufacturers
Hanover Trust Company sued here-
in as Manufacturers Trust
Company.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT V. RAFTER

-against-

MANUFACTURERS TRUST COMPANY,
CARRIER CORPORATION,
GIFFORD, WOODY, CARTER & HAYS and
DONALD HAYS

Defendants

- - - - - X

Plaintiff

PRO SE
65 Civil 1313 (CLB)

JUDGMENT

:

:

:

Defendants having moved the Court for summary judgment,

pursuant to Rule 56, of the Federal Rules of Civil Procedure, and
the said motion having come on to be heard before the Honorable
Charles L. Brieant, United States District Judge, and the Court
thereafter on December 9, 1974, having handed down its memorandum
opinion in favor of defendants, and denying all relief to the
plaintiff, and directing the Clerk to enter judgment, it is,

ORDERED, ADJUDGED and DECREED: That defendants MANUFACTURERS
TRUST COMPANY, CARRIER CORPORATION, GIFFORD, WOODY, CARTER & HAYS
and DONALD HAYS, have judgment against plaintiff ROBERT V. RAFTER,
dismissing the complaint, and that all relief shall be denied to
plaintiff.

Dated: New York, N.Y.
December 12, 1974

Raymond F. Berglandt
Clerk

DEC 12 1974

MICROFILM

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others; when contracts or agreements of that description are lawful as applied to intra-state transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory,

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize or any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 2, 25 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

Rule 56. Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim, interclaim, or cross-claim or to obtain a declaratory judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(c) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.



STATE OF CONNECTICUT)
COUNTY OF FAIRFIELD) ss:

being duly sworn, deposes
and says:

She is a resident of Westport, Connecticut and is
over 18 years of age and is not a party to this action.

On the 27th day of March 1975 she served the within
Brief and Appendix upon Simpson, Thacher & Bartlett at
One Battery Park Plaza, New York, New York and upon Gifford,
Woody, Carter & Hays at One Wall Street, New York, New York
by depositing two copies for each in a U. S. Post Office
Depository within the State of Connecticut.

s/ Carol D. Malone

Subscribed and sworn to this
27th day of March, 1975

s/ Virginia R Carpenter
Notary Public

My Commission Expires April 1, 1975